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## CONSERVATION EASEMENTS

### Background

Conservation easements have been widely used throughout the nation in recent years but have been the subject of increasing controversy in some areas. Since the 1980s, conservation easements have been used in an attempt to prevent the spread of urban development or to prohibit certain uses of land in rural areas that have agricultural, wildlife, grassland, wetland, scenic, historic, or other environmental or conservation value. Under the conservation easement mechanism, landowners sell or donate easements on their property that will regulate or prohibit various uses, activities, or development on the property in future years. Conservation easements are sold or donated to government agencies or to private, nonprofit land trust organizations and often receive federal or state tax incentives. Most of these conservation easements are perpetual, and the prospect of restricting the use of property for future generations, as well as uneasiness with the long-range land use goals of urban environmentalists, has fueled opposition to the use of conservation easements. Supporters of conservation easements, on the other hand, view them as valuable tools in the preservation of rural land from urban encroachment, the preservation of wildlife, and the protection of land from environmental threats.

### Easements

An easement is the legally binding right to use the real property of another person for some specified purpose. The easement constitutes a real property interest, but legal title to the land on which the easement is held is retained by the owner for all other purposes. When the property is sold, the easement and the privileges or restrictions that go with it remain with the property and are binding on the new property owner. Easements have roots in common law and are widely and routinely used in dealing with real property. In fact, most property is probably subject to some type of easement. Examples include easements to allow the placement of aboveground or underground utility or sewer lines on the property, easements for telephone and cable television lines, sidewalk easements, storm drain easements, driveway easements (when adjoining properties share a driveway or when a lot does not border a road), easements authorizing entry to repair a fence or slide area, easements to allow access to landlocked property, and easements for many other purposes. Title reports and title abstracts usually describe all existing easements on a parcel of real property.

Easements may be public or private; a private easement is limited to a specific individual such as the adjoining landowner, while a public easement grants a right to a large group of people or to the general public, such as an easement on streets or highways. Easements are usually negotiated to fit the individual circumstances related to the property, but a prescriptive easement can be created by continuous and open use

by a nonowner for a number of years specified by statute. Negative easements prohibit certain uses or actions on a piece of property. Conservation easements usually fit into the negative easement category because they are intended to preserve certain characteristics of the land and prohibit certain development activities, rather than providing a nonowner with a specific right in relation to the property.

### **Conservation Easements – Characteristics**

A conservation easement is a legal agreement by which a landowner voluntarily transfers specified development and land use rights to a government agency or a qualifying nonprofit organization. The nonprofit organization or the government agency, as the holder of the conservation easement, has the right to periodically assess the condition of the property to ensure that it is being maintained in accordance with the conditions of the easement. Conservation easements are intended to protect ecosystems, wildlife habitats, open space, rare species, unique land forms, public water supplies, or historic or recreational features of the land. They can also be used to preserve the agricultural character of land by prohibiting certain forms of development, particularly urban development or sprawl. For example, a landowner donating a conservation easement could limit the right to develop a property but retain the rights to build a house, raise cattle, and grow crops on the property. Conservation easements are sometimes used to link or connect properties that have similar conservation values. Some conservation easements allow public access to the property, but many do not, and public access is not an automatic feature of conservation easements.

Examples of conservation easements include: limiting certain housing construction to preserve a scenic vista while generally allowing housing construction in the area; protecting habitat areas for specific wildlife species; protecting wildlife, open space areas, and areas with prehistoric and historic cultural features, while continuing to allow grazing and other agricultural activity and allowing owners to maintain and improve existing structures in specified areas; reintroducing and protecting native plants in a specified area; prohibiting commercial activities and restricting urban development and new construction on a ranch but allowing maintenance of existing roads and structures; allowing grazing of cattle but prohibiting grazing of sheep or exotic animals; and many other possibilities. The contents of conservation easements depend on the situation and come in an almost unlimited number of variations.

Conservation easements are extremely flexible and can be written to address a myriad of situations and possibilities on a case-by-case basis. They are essentially contracts or agreements between the parties that spell out the rights and limitations that apply to the land for each party. Once the easement is executed, the holder of the easement has the legal right to enforce the terms of the easement on the property. The property owner retains the other rights associated with ownership of the property.

Most conservation easements are perpetual, although some programs offered by government agencies, such as the Farmland Protection Program or the Wetlands Reserve Program of the U.S. Department of Agriculture allow easements for a specified number of years (some programs have a thirty-year minimum) or a perpetual easement. Federal tax incentives that apply to conservation easements require that the easement

be perpetual, and many nonprofit land trust organizations that acquire conservation easements will only accept perpetual easements. It should be noted that a court may modify or terminate a conservation easement because of changed conditions, if the purpose for which the easement was created becomes impracticable or if the easement can no longer be used to accomplish any conservation purpose, although the process is more difficult for conservation easements than for other easements.

Conservation easements may be sold or donated, although most are donated. While government agencies have numerous programs that involve conservation easements, private, nonprofit organizations, usually organized as “land trusts” are the most common holders of conservation easements. The reasons that property owners grant conservation easements vary, but most often are either economic or arise out of a desire to preserve their land in a particular condition, and frequently out of a desire to prevent their land from being swallowed up by urban sprawl and development.

## **Land Trusts**

Most conservation easements are held by land trust organizations. To qualify for tax benefits, easements must be granted to either a government agency or a nonprofit, tax-exempt conservation organization, usually called a land trust. Land trusts may be national, regional, or local organizations and they have a variety of conservation objectives. One of the best known national land trust organizations is the Nature Conservancy. Other familiar organizations include the Trust for Public Land, the Wilderness Land Trust, Wildlife Land Trust, the American Farmland Trust, and the National Trust for Historic Preservation, but there are hundreds of other land trust organizations in the United States. Some land trusts view the protection of agriculture as their primary conservation or funding purpose; but land trusts have a wide range of conservation and preservation objectives, focusing on open space, wildlife, or endangered species protection, while others focus on providing public recreation opportunities or preserving historic structures or areas.

The land trust initially works with the landowner to arrive at terms and conditions of the conservation easement that are agreeable to both parties. In addition, land trusts can refer landowners to legal, tax, or natural resources professionals who are familiar with conservation easements. The land trust may also work with the landowner to establish a management plan to assist in carrying out the terms of the easement.

The land trust, or other holder of a conservation easement, has the right and responsibility to enforce the terms of the easement for both current and future property owners of the affected land for as long as the easement exists. Actions of the land trust in the course of monitoring and enforcing the easement typically include establishing baseline documentation and information about the property; monitoring land use through regular visits, usually annual, to the property to ensure that easement restrictions are being upheld; providing information and background data about the easement to new or prospective owners; and consulting or collaborating with the landowner to resolve conflicts or questions. If the land trust finds a violation of the easement, it can take legal action to correct the violation.

The Land Trust Alliance counted 1263 land trust organizations operating in the United States in 2000 compared with 887 in 1990. Land trusts in 2000 held nearly 2.6 million acres under conservation easement and 1.2 million acres owned by land trusts. In addition, nearly 2.4 million acres either owned or under easement to land trusts had been transferred to government agencies and other organizations, for a total of 6.2 million acres listed as protected by land trust organizations in 2000. This compares with 1.9 million acres protected in 1990, including 450,385 acres under conservation easement, 435,522 acres owned, and 1.0 million acres transferred.

Land trusts appear to be most active in areas that are located close to highly urbanized areas and less active in less populated areas, even though rural states generally have more land area. The impetus for land trust activity is to protect land from urban development, so this pattern is to be expected. In 2000, the Northeast region (the New England States and New York) had 1.7 million acres listed by the Land Trust Alliance as protected, and the Pacific region (California, Nevada, and Hawaii) had nearly 1.3 million protected acres. The Midwest and South Central regions, by contrast, had 309,200 and 105,967 protected areas, respectively. The state with the largest number of land trusts was Massachusetts with 143 organizations, followed by California with 132, Connecticut 112, Maine 76, Pennsylvania 75, and New York 72.

Three land trusts operate in South Dakota. The Northern Prairies Land Trust operates in South Dakota and Nebraska; the Iowa Natural Heritage Foundation operates in Iowa and South Dakota; and the Rocky Mountain Elk Foundation operates in numerous western states, including South Dakota.

### **Financial Incentives for Conservation Easements**

The financial aspects of conservation easements vary with individual landowners. Some conservation easement programs allow easements to be sold outright, with the landowner receiving payment for granting the easement. More commonly, however, conservation easements are donated to land trust organizations, with the landowner who donates the easement eligible for federal and sometimes state tax incentives if the easement and the property meet certain requirements.

To qualify for federal tax benefits, conservation easements must be donated to either a federal, state, or local government agency or to a nonprofit 501(c)(3) organization with a conservation purpose and the ability to enforce the easement, usually a land trust organization. The federal Internal Revenue Service Code Section 170(h) requires that qualifying conservation easement donations must be perpetual and must meet at least one of the following purposes:

- Preserves land for public outdoor recreation or education.
- Protects relatively natural habitats of fish, wildlife, or plants.
- Preserves open space, including farms, ranches, or forests, for either scenic value or as part of a clearly delineated public policy, such as a local open space plan.
- Preserves historically important land or certified historic structures.

If the requirements are met, a landowner may be able to deduct up to the full value of the conservation easement from his or her federal income taxes as a charitable contribution. The value of the easement must be determined by a land appraiser and is essentially the difference between the value of the land with the easement restrictions in place and the value of the property without such restrictions. In areas where development pressure is intense, the property is worth much more without the easement than with the easement, so the value of the easement is higher. In more remote areas, the difference in the value of the property with and without the easement is less and the value of the easement is less. The IRS allows the landowner to deduct the full value of the conservation easement from his or her adjusted gross income up to thirty percent of the landowner's income for the year of the donation of the easement. If the value of the donation is greater than this amount, the remaining value of the donation may be deducted for the next five years, subject to the thirty percent annual limit. The tax code is complex, and actual situations may vary depending on the value of other lands held by the landowner and other factors.

Conservation easements can also result in savings on federal estate taxes. For estate tax purposes, federal law requires that the value of the land be calculated on the basis of the land's highest and best use, rather than the current actual use. The potential value of agricultural land that could be used for suburban development without a conservation easement is less than the potential value of such land on which development is restricted by a conservation easement. Since the value of the land with a conservation easement is less, estate taxes will also be less, and the property owner can provide for a reduction in estate taxes for his or her heirs by placing a conservation easement on the property.

In many states, conservation easements may also qualify for tax savings and incentives for state and local taxes.

### **State Legislation – Conservation Easements**

Tax favored treatment for conservation easements began with the federal Tax Reform Act of 1976. Until that time, conservation easements were seldom used, except for the Small Wetland Acquisition Program operated by the U.S. Fish and Wildlife Service. In some situations, it was questionable whether state common law would allow an easement for conservation purposes, which suggested the enactment of state statutes to authorize the use of conservation easements. In 1981, the National Conference of Commissioners on Uniform State Laws adopted a Uniform Conservation Easement Act as a model for state conservation easement statutes. Since then, a large number of states have enacted conservation easement statutes to authorize and govern conservation easements, many of them based on the uniform act. By 1984, 37 states had passed conservation easement laws, and more have been enacted since then. Also, over a ten-year period, the number of land trust organizations increased by 63 percent.

South Dakota's conservation easement law was passed in 1984 and is codified at SDCL 1-19B-56 through SDCL 1-19B-60. South Dakota's law is based closely on the Uniform Conservation Act and has never been amended. South Dakota's statute

defines a conservation easement as, “a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, paleontological or cultural aspects of real property.”

### **Conservation Easements – Precautions**

Conservation easements should be written as specifically as possible to avoid confusion as to what is intended and which property rights are being transferred. For example, an easement prohibiting development on the property may prevent the owner’s heirs from building a house on the property if the terms of the easement are not clearly stated. Even an apparently obvious term, such as “agricultural use,” may be interpreted differently by two parties. Open space to some might mean grazing and to others it might mean curtailing grazing in the interest of wildlife. Specificity is extremely important in preparing the easement.

Conservation easements may not be appropriate in all situations. Landowners considering a conservation easement should consult with family, professional legal and tax advisors, financial advisors, accountants, and land trust representatives to determine whether a conservation easement is appropriate for their long-term economic and conservation goals. Landowners considering a conservation easement should seek as much professional assistance as possible. Landowners should also talk with other landowners who have used conservation easements; their experience and advice could be an important source of practical information.

Landowners must attempt to anticipate future situations before agreeing to a conservation easement. Such things as future timber harvest, salvage value of dead timber, potential homes for future generations of family members, mineral rights, and future ranch roads are examples of issues that need to be considered.

Most conservation easements are perpetual. Perpetual does not mean 99 years; perpetual means permanent. The terms of the conservation easement are binding on future generations in the face of changing economic and environmental conditions and subject to varying interpretations of the easement language. A conservation easement can be a useful tool for the preservation of rural and environmental values, but a landowner should exercise utmost caution in preparing and negotiating a conservation easement on his or her property. Landowners should consider whether their motivation to sell or donate a conservation easement could be achieved in another way.

### **Criticisms of Conservation Easements**

Although the use of conservation easements and the growth of land trusts have greatly increased in the last two decades, their popularity is not unanimous, and many groups have voiced concerns about some of the purposes and practices associated with conservation easements.

Probably the most common criticism or concern about conservation easements is the fact that they are perpetual. Future generations holding the property will be limited by the terms of the conservation easement regardless of how local or national situations, values, and attitudes may change. It is difficult to predict how people will want to use land one hundred years from now, and it is difficult to write an easement so precisely that future landowners and easement holders agree on the intentions of the original property owner who granted the easement. For example, in an easement that allows livestock grazing provided that it does not cause significant deterioration to stream banks, water quality, vegetative communities, or soil structure and composition, who determines what constitutes significant damage and how is such damage measured? What constitutes acceptable management practices? How will these provisions be interpreted in fifty years? Also, conservation easements are transferable, and the new holder of the easement may have a different interpretation of what the easement means than the original holder. Conservation easements can reduce the economic value of land and prevent future generations from making full economic use of the property. The idea that conservation easements restrict what succeeding generations can do with their property in perpetuity is a serious concern for those who oppose conservation easements.

Another source of opposition to conservation easements is the idea that they are used to carry out the agenda of urban environmentalist groups, which may run counter to the interests of property owners and their heirs or the surrounding community. There is a fear that property rights acquired through conservation easements will be used in combination with lands held by other government agencies and conservation or environmental groups to create large parcels of land dedicated to environmental purposes rather than agriculture or private use. There is also a fear that conservation easements will be used to link large parcels of public land or other land that is held for environmental purposes when private land lies between such parcels. The eventual result would be large corridors of land devoted to environmental purposes at the expense of agriculture and private property owners. Many conservation easements have been transferred from private land trust organizations to government agencies, which is another source of concern to property rights proponents. Another example that could indicate environmentalist values and agendas driving some conservation easement programs is found in easements that are intended to protect forest land from development but also restrict active forest management, often to the detriment of the landowner and the health of the forest. Rightly or wrongly, ideological impulses on both sides of the environmental movement are factors in the use of conservation easements and in the controversy surrounding them.

Other concerns that have been voiced about conservation easements are that they make it more difficult for a landowner to obtain a loan on his or her property or to sell the property because of the split title; that the tax incentives of donated easements primarily benefit well-to-do property owners; that, conversely, landowners who are experiencing financial difficulties may be tempted to sell a conservation easement to the detriment of future generations; that some land trust organizations may not be capable of managing the conservation easement or dealing with future legal challenges, especially over the long term as the original parties to the agreement have passed from the scene; that heirs of the landowner may be unable to build or renovate a house or other agricultural

buildings on the property, depending on the terms of the easement; that land trusts enjoy a preferential relationship with government agencies and often transfer the easement to government agencies. Some of these potential problems are more troublesome than others, but they represent the concerns of those who oppose some uses of conservation easements.

### **Advantages of Conservation Easements**

Clearly, there are areas in the United States where agricultural and forest lands, as well as land with other types of conservation, historical, or recreational values, are genuinely threatened by urban growth and development and urban sprawl, and there are many other areas throughout the country that are in need of protection or that possess characteristics that the landowner may wish to preserve. Conservation easements are one tool that is available to affect the future condition and use of land. They are entered into voluntarily and are the result of a landowner exercising property rights over the land that he or she owns. The right of a property owner to determine to whom and under what conditions property or property rights will be transferred is a time-honored and fundamental right protected by common law.

Not all conservation easement programs are operated by environmental groups. An example is the Colorado Cattlemen's Agricultural Land Trust (CCALT) established by the Colorado Cattlemen's Association for the purpose of preserving agricultural land for agricultural uses. In Colorado, more than 270,000 acres are taken out of agricultural production each year, with more than two million acres converted to other uses since 1992. These trends were the impetus for the creation of the CCALT. The desire to keep agricultural land in production and to keep agricultural families on the land in the face of urban and suburban development is the driving force behind many conservation easement programs. Depending on how the easement is written, landowners and their heirs can remain on the land and continue agricultural operations. It must be stressed that conservation easements are extremely flexible agreements that can be tailored to meet the landowner's individual situation, and if the landowner is not satisfied with the terms of the easement, he or she is not required to enter into it. As noted earlier, conservation easements also include various financial and taxation incentives for property owners.

It is also clear that many if not most conservation easement programs are focused on environmental goals: preserving wildlife habitat and reversing habitat fragmentation; preserving wetlands, grasslands, and water resources; preserving historical, open space and recreational areas; and so on. Even in rural parts of the nation, natural resources are threatened or lost because of economic pressures. In central South Dakota, according to Ducks Unlimited, more than 200,000 acres of native prairie were converted to cropland between 1987 and 2002. Protection of grasslands and wetland helps to preserve South Dakota's farming and ranching heritage and preserve the beautiful prairies that are still present in South Dakota. Many landowners who grant conservation easements do so out of a sincere desire to preserve certain environmental characteristics of the land. They are able to reconcile their agricultural operations with restrictions on portions of their property that serve environmental objectives. For government agencies such as the U.S. Fish and Wildlife Service, conservation

easements represent cost effective conservation. The cost of purchasing and managing a conservation easement on private land is much less than purchasing the land, and the land remains in private ownership. Conservation easements are capable of addressing a large variety of environmental and conservation needs in a flexible and individualized way.

### **Potential Legislative Actions Related to Conservation Easements**

As stated above, many states have enacted laws over the last twenty years to allow the use of conservation easements. Currently, only Wyoming, Pennsylvania, and North Dakota have not enacted uniform conservation easement laws. The 2003 Wyoming legislature defeated a uniform conservation easements bill. There has been some legislative effort to regulate conservation easements. A bill was introduced in the Montana Legislature in 2003 to require that entities acquiring conservation easements be licensed as “encumbrance brokers,” that a two-year cooling off period be required before a conservation easement could be transferred, and that the landowner could veto the transfer of a conservation easement. The bill would also have prohibited conservation easements that prevent natural resource use. The Montana bill was tabled in committee. In South Dakota, HB 1194, introduced in the 2004 Legislative Session, would have limited any conservation easement created after July 1, 2004, to a term of thirty years, rather than perpetuity. The bill did not apply to wetlands easements. HB 1194 passed the House Agriculture and Natural Resources Committee but was defeated on the House floor by a vote of 18-50.

The regulation of conservation easements is a difficult task. Conservation easements are extremely flexible and varied, which makes them hard to define and causes difficulty in creating regulations or limitations that apply uniformly. The state of North Dakota has a statute limiting certain easements to thirty-three years, but because federal law supercedes state law, organizations can purchase perpetual conservation easements in North Dakota if title is given to a federal agency. Another problem with limiting perpetual easements is that federal tax breaks on conservation easements held by private land trusts only apply to perpetual easements. Consequently, almost all land trusts require perpetual easements. The sheer diversity of types of conservation easements and situations that produce easements makes it difficult to determine which easements should have limited terms and which should be perpetual. The range of subjects and situations that could be interpreted as related to conservation is huge.

The diversity associated with conservation easements raises other issues. Strictly speaking, there is no such thing as a conservation easement. A conservation easement is simply an easement that deals with natural resources topics. Easements are part of a system of traditional real property tools and principles that allow a landowner to enter into agreements to specify how he will handle his property. Attempting to restrict an individual's ability to handle his property as he sees fit when dealing with conservation matters could be viewed as a taking of private property and a violation of constitutional equal protection rights. An easement is a well-established property transaction mechanism that plays a fundamental role in the real estate industry. Easements are also often used in the enforcement of environmental law to place restrictions on the use of lands that are subject to cleanup activity or that are used as mitigation acres for other

land that is being developed. Legislative changes to this system in an area as ill-defined and varied as “conservation” run the risk of causing problems in other areas affecting real property and would most likely be challenged on constitutional grounds.

## **Summary**

The use of conservation easements to protect agricultural land from urban development and to preserve environmental values is a recent phenomenon that has grown rapidly. Conservation easements have been widely used for environmental purposes and are viewed by their proponents as a vital tool in the protection of agricultural and environmentally sensitive lands. Conservation easements allow private landowners to determine the future use of their property by restricting how the property will be used through an easement granted to a conservation organization or to a government entity, often in return for financial gain or tax benefits. The easement agreement is voluntary and is based on traditional property rights principles. Critics worry that perpetual easements will restrict the ability of future generations to put their land to the best use, and they worry that landowners in need of financial help will be tempted to place easements on their property for temporary financial relief at the expense of future generations. Although there may be a need to regulate some practices related to conservation easements, designing appropriate legislation is not an easy task. As the use of conservation easements expands, additional conflict and controversy over their use can be expected.

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**This issue memorandum was written by Tom Magedanz, Principal Research Analyst for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.**

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